INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes and Court Rules Involved	3
Statement of the Case	3
Reasons for Granting the Writ	6
Conclusion	10
Appendix:	
Opinion of the Third Circuit	1a
Judgment of the Third Circuit	7a
District Court Order Confirming Sale	8a
District Court Order Denying Motion to Reopen Case and Amend Judgment	9a
District Court Order Denying Motion to Set Aside Judicial Sale	10a
Rule 60, Federal Rules of Civil Procedure	10a
5 V. I. Code § 489	11a
Local Rule 6, District Court for the Virgin Islands	13a

CITATIONS

Cases:

Garner v. *Tri-State Development Co.*, 382 F.Supp. 377 (E.D., Mich. 1974)	9
Klapport v. *United States*, 355 U.S. 601 (1949)	8
Lucerne Investment Company v. *Estate Belvedere, Inc.*, 7 V.I. 275 (D., V.I., 1969)	6
Murchinson, In Re, 349 U.S. 133 (1955)	7
Offutt v. *United States*, 348 U.S. 11 (1954)	7
Thornberg v. *Jorgensen*, 60 F.2d 471 (3rd Cir., 1932)	6

Page

STATUTES:

28 USC § 1254(1) 2
48 USC § 1612 2
5 VIC § 489(1) 2, 6

OTHER MATERIALS:

Fifth Amendment, Constitution of the United States . 7
Federal Rules of Civil Procedure, Rule 60(b) 8, 9
Local Rule 6, District Court for the Virgin Islands..4, 5, 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No.

BETTY JEAN TYSON, *Petitioner*

v.

VIRGIN ISLANDS NATIONAL BANK, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United Staes Court of Appeals for the Third Circuit entered in the above case on December 30, 1974.

OPINIONS BELOW

Memoranda orders of the District Court for the Virgin Islands, Division of St. Thomas and St. John, confirming sale (Appendix, page 8a), denying motion for an order to reopen case and amend judgment (Appendix, page 9a), and denying the motion for an order to set aside the judicial sale (Appendix,

page 10a), are unreported. The opinion of the Court of Appeals for the Third Circuit is reported at 506 F.2d 802 and appears in the Appendix at page 1a.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was made and entered on December 30, 1974 (Appendix, page 7a). The jurisdiction of this Court is invoked under 28 USC § 1254(1). Jurisdiction of the District Court in the first instance is pursuant to 48 USC § 1612.

QUESTIONS PRESENTED

In proceedings on a writ of execution for a judicial sale of 53 acres of land pursuant to a judgment of foreclosure on a mortgage note. Respondent judgment creditor filed a motion under 5 VIC § 489(1) to confirm the judicial sale without serving a copy of its motion on the Petitioner judgment debtor. The court entered the order on a *ex parte* basis.

Respondent's motion to confirm the judicial sale was filed on June 28, 1973. The court's order confirming the sale was entered on July 5, 1973. On July 10, 1973, Respondent's counsel served notice on counsel of record for Petitioner together with a copy of its June 28 motion to confirm, which notice specified that the motion to confirm would be heard by the District Court on July 16, 1973. Petitioner appeared in court for the hearing pursuant to the notice on July 16, 1973 and there was informed by the court that it had entered the order confirming the sale on July 5, 1973.

Thereafter, Petitioner sought to reopen the case and amend judgment, and separately sought to have the judicial sale set aside and a new sale ordered. The

District Court denied all relief sought by Petitioner on the basis that its Local Rule 6 authorized its entry of the order under the circumstances and further concluded that there were no other grounds warranting Petitioner's requested relief. The Court of Appeals affirmed. The questions presented are:

1. Whether the District Court may confirm a judicial sale of real estate sold to satisfy a judgment on a mortgage note in *ex parte* proceedings where the owner and judgment debtor are denied both notice of, and the opportunity to be heard in, the proceedings.

2. Whether the District Court's failure to observe its own Local Rule 6 relating to service and notice of all motions, and thereby deprived Petitioner notice and the opportunity to be heard or respond to a proposed motion to confirm a judicial sale, afforded Petitioner due process of law or, alternatively, provided adequate grounds for relief under FRCP 60(b).

3. Whether the District Court abused its discretion in denying Petitioner relief under FRCP 60(b) from an order confirming a judicial sale where the order was considered and entered on an *ex parte* basis and without notice to the Petitioner.

STATUTES AND COURT RULES INVOLVED

The pertinent portion of the Virgin Island Code, § 489; Local Rule 6 of the District Court for the Virgin Islands, and Rule 60(b) of the Federal Rules of Civil Procedure are set forth in the Appendix, beginning at page 10a.

STATEMENT OF THE CASE

This action arises out of proceedings by Respondent Virgin Islands National Bank to foreclose on its security for a $165,000 mortgage note executed on

April 6, 1971, by Petitioner Betty Jean Tyson, The entire principal and interest on the note was payable on or before December 31, 1971 and the note was secured by a first priority mortagge on 53 acres of real estate and improvements (which included Petitioner's home), located on the island of St. Thomas, U. S. Virgin Islands. Upon default in the payment of the note, Respondent filed its Complaint For Debt and Foreclosure in the District Court on April 27, 1972 and obtained judgment therein on July 13, 1972. A writ of execution on the judgment was issued on October 3, 1972. The United States Marshal conducted the judicial sale of Petitioner's real estate on April 18, 1973 and his return of service was filed on June 18, 1973.

On June 28, 1973, Respondent's counsel filed its motion to confirm sale in the District Court. Respondent's motion was not served on Petitioner at or before the time it was filed with the court, nor did it contain a certificate of service as required by the District Court's Local Rule 6(j). On July 5, 1973, the District Court granted the Respondent' motion to confirm the judical sale and entered its order.

On July 10, 1973, Respondent's counsel served a copy of its June 28 motion to confirm the judicial sale together with a notice that the motion was being set for a hearing on July 16, 1973. Pursuant to the notice, Petitioner appeared in the District Court on July 16, 1973 and learned from the court that the confirmation of the judicial sale had already been accomplished and that no hearing was necessary.

Thereafter, Petitioner appeared at Respondent bank on January 8, 1974 to redeem her property, which date was the first business day following the expiration of

the six-month redemption period provided for under local law and was then informed that Petitioner's redemption rights had expired on January 7, 1974. Subsequent to her conference with the Respondent, but on the same day, Petitioner filed her first motion in the District Court seeking to reopen the case and amend judgment, the stated objective of which was to have the confirmation order of the judicial sale deemed to have been entered as of July 16, 1973, in conformity with the notice Petitioner had received. This motion was denied after a hearing on February 12, 1974.

On February 14, 1974, Petitioner filed a second motion in the District Court seeking to have the order of confirmation of the judicial sale of July 5, 1973 vacated, the April 18, 1973 judicial sale set aside and a new judicial sale ordered. At the hearing on this motion, Petitioner testified that at the time of the judicial sale she was then without counsel as was not familiar with the legal proceedings surrounding the judicial sale and order confirmation of the judicial sale. The District Court denied Petitioner relief upon reliance that its Local Rule 6 authorized the entry of its prior order of confirmation and that no other basis for relief was available to Petitioner.

On appeal, the Court of Appeals characterized the question presented as involving solely whether the District Court abused its discretion in denying Petitioner relief from its order of July 5, 1973. The Court of Appeals, *sub silentio,* approved the application of the Local Rule 6 as applied in this case. The Court of Appeals did not discuss the merits of Petitioner's objections to the conduct of the judicial sale but simply indicated that it was withholding relief

because "judgment debtors may not assert untimely challenges on the basis of irregularities which were readily ascertainable before the close of the statutory period for filing objections". Appendix at page 5a. Similarly, the Court of Appeals did not address the issue of Petitioner's lack of counsel at the critical time the objections could have been timely filed, i.e., within five days folowing the sale. 5 VIC § 489(1).

The Court of Appeals and the District Court both turned aside the judicial precedent of the court entertaining objections to judicial sales on the merits at any time prior to the judicial sale. *Lucerne Investment Company* v. *Estate Belvedere, Inc.,* 7 V.I. 275 (D., V. I., 1969). In *Thornberg* v. *Jorgensen,* 1 V. I. 606, 60 F.2d 471 (3rd Cir., 1932), it appears that the Court of Appeals remanded the case for the consideration of objections to a judicial sale following the order of confirmation.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because it erroneously applies the concepts of due process that deprive unrepresented judgment debtors in mortgage foreclosure proceedings of notice and the opportunity to be heard. Additionally, the decision below sanctions the deprivation of legal rights by a District Court's failure to observe its own rules.

Judicial precedent permitted objections to judicial sales of real estate in the Virgin Islands to be heard on the merits at any time prior to the entry of the judicial order confirming the sale. Petitioner possessed valid and meritorious objections to the judicial sale of her property, but was denied notice that the motion for confirmation of the sale had been submitted prior to

its entry, and was mislead by the notice of the Respondent as to the time when her objections might be presented to the District Court. The proceedings below do not satisfy the appearance of justice. *In Re Murchinson,* 349 U.S. 133 (1955); *Offut* v. *United States,* 348 U.S. 11 (1954). Due process under the Fifth Amendment to the Constitution requires notice of the proceedings as an absolute minimum.

The District Court relied upon its Local Rule 6(j) to sustain its action. Other paragraphs of that Rule were not applied. Rule 6(g) provides:

> (g) The movant and respondent shall serve copies of their respective papers upon opposing counsel before they are filed with the clerk, and such papers must indicate the time and method of service.

This portion of the Rule was not observed by Respondent's counsel or the court.

Additionally, Local Rule 6(j) precluded the court acting upon Respondent's motion for confirmation of the judicial sale. In pertient part, it provides

> (j) * * * Motions filed which are not in conformity with this rule *shall not* be entertained by the court. (Emphasis added.)

That Petitioner did not have notice, and that the motion for confirmation of the judicial sale was not served upon Petitioner or any other person affiliated with Petitioner, and that Respondent's motion did not indicate the time and method of service, are beyond dispute. The District Court and the Court of Appeals reliance on Local Rule 6 to sustain the action of the District Court in this case is not justified.

The Court of Appeals imputes knowledge of the statutes governing Petitioner's rights to the Petitioner, which if correct, should likewise impute knowledge of the court rules and the judicial precedents applicable to Petitioner's proceeding. Justice cannot be a selective application of legal rules, particularly when FRCP 60(b) is invoked as the basis for relief.

Additionally, the decision below in the context of the facts in this case, sanctions a departure from the accepted and usual course of judicial proceedings to such an extent as to warrant the exercise of this Court's power of supervision. Both the District Court and the Court of Appeals had the facts of two evidentiary hearings on Petitioner's two motions for FRCP 60(b) relief before them. FRCP 60(b) calls upon the judiciary to apply equitable principles of fairness and does not demand that issues presented rise to Constitutional proportions before relief can be granted thereunder. *See, Klapport* v. *United States,* 335 U.S. 601 (1949).

Instead of applying FRCP 60(b) in the manner intended for just such a case as the instant one, the courts below imputed to Petitioner the knowledge of one schooled in law, rather than a standard of legal knowledge that could reasonably be expected of the laity. The Court of Appeals tersely denied Petitioner's claim for relief by charging her with constructive knowledge of the objections to the judicial sale within five days after the sale was held, and charges her with the constructive knowledge of the means and methods of presenting them. This establishes too high a standard for an unrepresented litigant.

In times of economic distress, mortgage debtors face foreclosure proceedings on real estate more frequently

than in times of economic prosperity. It is likely, also, that mortgage debtors will not have the funds to employ counsel to represent them while mortgage creditors will. The courts should protect the interests of the judgmement debtor, at least to the extent that the judgment debtor is made aware of the need for counsel or the opportunity to interpose objections to the judicial sale, that the court satisfy itself that all parties have been given ample notice, and that the court observe and apply its own rules. Furthermore, once the judgment debtor becomes aware of meritorious objections to the sale, FRCP 60(b) should be liberally construed, and the courts should exercise their judicial discretion thereunder broadly, so that plausible objections can be determined on their merits within the time limitations of FRCP 60(b). In this case, all motions were timely within all provisions of FRCP 60(b). Unless such a construction is placed upon FRCP 60(b), the administration of justice will not satisfy the appearance of justice, or in fact provide justice, for unrepresented judgment debtors. Cf., *Garner* v. *Tri-State Development Co.*, 382 F.Supp. 377 (E.D., Mich., 1974).

At the time of the judicial sale on April 18, 1973, any objections Petitioner might have to the judicial sale became fixed. Infirmities and irregularities in that sale could not thereafter be constructed or created. The decisions below preclude Petitioner relief where, had she been able to afford and be represented by counsel at the critical stage for filing the objections, relief would be available to her and thus exact a forefeiture of her rights in her property while glossing over the principles of fairness and equity that justice demands.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

ROBERT F. STEEVES
1435 G Street, N. W.
Washington, D. C. 20005

Counsel for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 74-1824

VIRGIN ISLANDS NATIONAL BANK

v.

BETTY JEAN TYSON and KENNETH B. TYSON

Betty Jean Tyson, Appellant

D.C. Civil Action No. 188-1972

APPEAL FROM THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

Argued December 6, 1974

Before SEITZ, *Chief Judge*, VAN DUSEN and ROSENN, *Circuit Judges*

ROBERT F. STEEVES, ESQUIRE
416 Washington Building
Washington, D.C.
Attorney for Appellant

THOMAS W. FINUCAN, ESQUIRE
Bornn, McLaughlin & Finucan
#8 Norre Gade
St. Thomas, Virgin Islands
Attorney for Appellee

OPINION OF THE COURT

(Filed December 30, 1974)

ROSENN, *Circuit Judge*

The sole question presented in this appeal is whether the district court abused its discretion in refusing to relieve appellant from an order confirming the judicial sale of her real estate.

On July 13, 1972, the Virgin Islands National Bank (Bank) obtained summary judgment in an action to foreclose on a mortgage note for $165,000 executed by appellant Betty Jean Tyson. A writ of execution issued pursuant to which the United States Marshal conducted a judicial sale of Mrs. Tyson's real estate on April 18, 1973. The Marshal made return of the writ on June 18, 1973.

The Bank filed a motion to confirm the sale on June 28, 1973. On July 10, the Bank served notice on Tyson that the motion would be heard on July 16. Meanwhile, the judgment debtor not having filed any objections to the sale, the district court granted the Bank's motion on July 5 without a hearing.

Mrs. Tyson filed a Motion for Order to Reopen Case and Amend Judgment on January 8, 1974, which the district court denied[1] on February 12. Mrs. Tyson filed another motion, styled a Motion for Order to Set Aside Judicial Sale, on February 14. This second motion was denied on March 4 after a hearing. On April 2 Mrs. Tyson filed a notice of appeal from the order of March 4.

Mrs. Tyson characterizes her second motion as one for relief from the confirmation order pursuant to rule 60(b) of the Federal Rules of Civil Procedure. We shall so treat it, although the motion nowhere states the basis upon which

1. In the order of dismissal, the district court stated:
Under the provisions of Rule 6 of the District Court of the Virgin Islands . . . oral hearing on a motion is not required and the Court in its discretion, the moving papers being in order, is fully authorized to act on the motion as it, in this case did.

relief is sought. *See United States v. Backofen,* 176 F.2d 263, 266 (3d Cir. 1949).

A party moving under rule 60(b) for relief from a judgment, order, or proceeding must clearly establish the grounds therefor to the satisfaction of the district court. *Federal Deposit Ins. Corp. v. Alker,* 234 F.2d 113, 116-17 (3d Cir. 1956). The district court's ruling on the motion is reviewable in this court only for abuse of discretion. *Estate of Murdoch v. Pennsylvania,* 432 F.2d 867, 870 (3d Cir. 1970); *Tozer v. Charles A. Krause Milling Co.,* 189 F.2d 242, 244 (3d Cir. 1951). We find no abuse of discretion and therefore affirm.

The Legislature of the Virgin Islands has specified the procedure to be followed in confirming the judicial sale of real property. 5 V.I.C. § 489. Section 489 provides in part:

> (1) The plaintiff in the writ of execution shall be entitled, on motion therefor, to have an order confirming the sale, unless the judgment debtor, or his representative in case of his death, files with the clerk his objections thereto within five days after the return thereof.
>
> (2) If such objections are filed, the court shall, notwithstanding, allow the order confirming the sale, unless on the hearing of the motion it shall satisfactorily appear that there were substantial irregularities in the proceedings concerning the sale, to the probable loss or injury of the party objecting. In the latter case, the court shall disallow the motion and direct that the property be resold, in whole or in part, as the case may be, as upon an execution received on that date.

Mrs. Tyson's contention that she was entitled to a hearing before the confirmation order was issued may not be presented in a rule 60(b) motion. Under section 489(1), she had until five days after return of the writ—in this instance, 66 days after the judicial sale—to file objections

based on substantial irregularities in the conduct of the sale. Upon her failure to file or move for enlargement of the time for filing objections, the district court had the power to enter an order confirming the sale without a hearing.[2] Thus, the only question presented by Mrs. Tyson's rule 60(b) motion is whether, despite her failure to object within the time limits specified by statute, she should be relieved from the confirmation order.

Mrs. Tyson advances several grounds [3] upon which she contends that relief from the confirmation order should have been granted by the district court:

(1) The notice of the judicial sale contained an inadequate description of the real estate to be sold.

(2) The seven contiguous parcels of real estate should have been offered, not only as a whole, but separately as well.

(3) The sole bid, made by the Bank, was grossly inadequate.

(4) The Bank learned before the sale that at least one other person might bid if the sale were postponed, but may have failed to communicate this information to the Marshal; if the information was communicated to the Marshal, his failure to postpone the sale in order to increase the number of bidders vitiated its validity.

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2. We need not decide whether a district court, in appropriate circumstances, may consider objections which are filed out of time. *See* Lucerne Investment Co. v. Estate Belvedere, Inc., 7 V.I. 275, 278 (D. V.I. 1969).

3. In addition to the four grounds enumerated, Mrs. Tyson contends that the confirmation order should have been vacated since the Bank would not permit redemption of her real estate three days after the six-month redemption period expired. Tyson apparently contends that, since the last day for redemption fell on a holiday, she was entitled to redeem on the next business day. Mrs. Tyson did appear at the Bank, which was the wrong place for redemption, on the next business day, but failed to make tender of the money for redemption. The district court did not abuse its discretion in rejecting this ground for relief.

Even were we to assume that Mrs. Tyson was wrongly denied her right to redeem, we doubt that she would be entitled to an order setting aside the judicial sale, although she might be entitled to an order extending the redemption period.

Mrs. Tyson has offered no evidence which would justify her failure to object on the first three grounds within the time specified by statute. 5 V.I.C. § 489(1); *see* Fed. R. Civ. P. 60(b)(1), (2). Clearly she knew or should have known the manner in which her real estate was advertised, offered, and sold by the time the period for filing objections expired. Judicial sales must have finality and judgment debtors may not assert untimely challenges on the basis of irregularities which were readily ascertainable before the close of the statutory period for filing objections.

With respect to her fourth ground for relief, Tyson may not have learned until after the period for filing objections that the Bank had knowledge of others who might have bid if the sale had been postponed. However, she has not proven that the Bank failed to communicate its knowledge to the Marshal. Moreover, assuming that the information concerning potential bidders was communicated to the Marshal, the judgment debtor here has not shown that the Marshal abused the discretion vested in him to postpone the sale. *See* 5 V.I.C. § 486. Thus, Mrs. Tyson has not demonstrated that she has a meritorious defense to confirmation of the sale and is not entitled to her fourth ground to the extraordinary relief provided by rule 60(b). *See* In re *Miller*, 262 F. Supp. 295, 297 (E.D. Ill. 1967).

In addition to the grounds enumerated individually above, Mrs. Tyson contends that, taken together, they entitle her to relief under reason (6) of rule 60(b).

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> • • •
>
> (6) any other reason justifying relief from the operation of the judgment.

Fed. R. Civ. P. 60(b). As indicated above, we are not persuaded by the individual grounds for relief raised by Mrs. Tyson. We do not believe that, considered collectively, they assume greater weight.

The order of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 74-1824

VIRGIN ISLANDS NATIONAL BANK

v.

BETTY JEAN TYSON and KENNETH B. TYSON,
BETTY JEAN TYSON, *Appellant*

(D.C. Civil No. 188-1972)

On Appeal From the District Court of the Virgin Islands,
Division of St. Thomas and St. John

Present: SEITZ, *Chief Judge*, and VAN DUSEN and ROSENN,
Circuit Judges.

Judgment

(December 30, 1974)

This cause came on to be heard on the record from the District Court of the Virgin Islands Division of St. Thomas and St. John, and was argued by Counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, dated March 4, 1974, be, and the same is hereby affirmed, with costs taxed against appellant.

ATTEST:

/s/ T. F. QUINN
T. F. Quinn, *Clerk*

Dated: December 30, 1974

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

Civil No. 188/1972

VIRGIN ISLANDS NATIONAL BANK, *Plaintiff*,

v.

BETTY JEAN TYSON AND KENNETH B. TYSON, *Defendants*.

Action for Debt and Foreclosure

Order Confirming Sale

(July 5, 1973)

This cause came on for further hearing on the Motion of Plaintiff, VIRGIN ISLANDS NATIONAL BANK, to confirm the sale made herein on the 18th day of April, 1973 by the U. S. Marshal, pursuant to the Judgment herein entered on the 13th day of July, 1972, and being advised in the premises, it is herewith,

Ordered that the report of said U.S. Marshall of said sale made by him as therein set forth be and the same is hereby approved and confirmed and it is further

Ordered, Adjudged, and Decreed that a proper and legal conveyance of all the property so sold be executed and delivered forthwith by said U.S. Marshal to said VIRGIN ISLANDS NATIONAL BANK, the purchaser to whom the same was sold.

Dated: July 5, 1973

/s/ ALMERIC L. CHRISTIAN,
Almeric L. Christian,
Chief Judge of the District Court

(Caption Omitted in Printing)

Order

(February 12, 1974)

Defendants herein have moved the Court for an order reopening the above captioned cause and amending the Judgment entered on July 13, 1972, as well as the Order Confirming Judicial Sale entered by this Court on July 5, 1973. Their request is grounded on allegations made on the said defendants behalf that counsel for the plaintiff in moving for an order to confirm the judicial sale upon foreclosure had noticed his motion for the 16th day of July, 1973, and had served defendants with such motion and notice thereof, whereas, in fact, the Court as of July 5, 1973, entered its Order Confirming the Sale. The record reflects that the motion to confirm the sale was filed with the Court on June 28, 1973. Under the provisions of Rule 6 of the District Court of the Virgin Islands (T.5 App. V R 6), oral hearing on a motion is not required and the Court in its discretion, the moving papers being in order, is fully authorized to act on the motion as it, in this case, did.

The premises considered therefore and the Court being fully advised,

It Is Ordered that the above mentioned motion of the defendants be, and the same is hereby denied.

Dated at Charlotte Amalie, St. Thomas, U.S. Virgin Islands this 12th day of February, 1974.

Enter:

/s/ Almeric L. Christian
Almeric L. Christian
Chief Judge

(Caption Omitted in Printing)

Order

(March 4, 1974)

Defendant, Betty Jean Tyson, filed a Motion dated February 15, 1974, entitled Motion for Order to Set Aside Judicial Sale. Hearing on said Motion came before the Court on March 4, 1974 and the Court having heard testimony on behalf of defendant, Betty Jean Tyson, testimony on behalf of the plaintiff, exhibits offered at the time of hearing, and briefs and arguments presented by counsel, and being fully advised in the premises;

Now THEREFORE, it is hereby ORDERED that the said Motion be, and it hereby is, denied. Each of the parties shall bear their own attorneys' fees and costs.

Dated: March 4, 1974.

/s/ ALMERIC L. CHRISTIAN
Almeric L. Christian
Chief Judge of the District Court

FEDERAL RULES OF CIVIL PROCEDURE

Rule 60. Relief from Judgment or Order

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein aising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his

legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action. As amended Dec. 27, 1946, effective March 19, 1948; Dec. 29, 1948, effective Oct. 29, 1949.

5 V.I. Code § 489

§ 489. Confirmation of sale of real property

Whenever real property is sold on execution the provisions of this section shall apply to the subsequent proceedings:

(1) The plaintiff in the writ of execution shall be entitled, on motion therefor, to have an order confirming the sale,

unless the judgment debtor, or his representative in case of his death, files with the clerk his objections thereto within five days after the return thereof.

(2) If such objections are filed, the court shall, notwithstanding, allow the order confirming the sale, unless on the hearing of the motion it shall satisfactorily appear that there were substantial irregularities in the proceedings concerning the sale, to the probable loss or injury of the party objecting. In the latter case, the court shall disallow the motion and direct that the property be resold, in whole or in part, as the case may be, as upon an execution received on that date.

(3) Upon the return of the execution, the marshal shall pay the proceeds of the sale to the clerk, who shall then apply the same, or so much thereof as may be necessary, in satisfaction of the judgment. If an order of resale is afterwards made, and the property sells for a greater amount to any person other than the former purchaser, the clerk shall first repay to such purchaser the amount of his bid out of the proceeds of the latter sale.

(4) Upon a resale the bid of the purchaser at the former sale shall be deemed to be renewed and continue in force, and no bid shall be taken except for a greater amount. An order confirming a sale shall be a conclusive determination of the regularity of the proceedings concerning such sale, as to all persons, in any other action, or proceeding whatever.

(5) If after the satisfaction of the judgment, there are any proceeds of the sale remaining, the clerk shall pay such proceeds to the judgment debtor, or his representatives, as the case may be, at any time before the order is made, upon the motion to confirm the sale, provided such party files with the clerk a waiver of all objections made or to be made to the proceedings concerning the sale; but if the sale is confirmed, such proceeds shall be paid to such party of course, otherwise, they shall remain in the custody of the clerk until the sale of the property has been disposed of.

Local Rule 6. District Court for the Virgin Islands

Rule 6. Motions

(a) MOTIONS SHALL BE IN WRITING. All motions, including objections to interrogatories and requests for admissions, unless made during a hearing or trial, shall be in writing.

(b) GROUNDS FOR MOTIONS. All motions shall state with particularity the grounds therefor, and shall set forth the relief or order sought.

(c) SIGNING OF MOTIONS. Every motion shall be signed by at least one attorney of record in his individual name. The signature of an attorney constitutes a certificate by him that he has read the motion; that to the best of his knowledge, information and belief there are good grounds to support it; and that it is not interposed for delay.

(d) DOCUMENTS SUPPORTING MOTIONS. When allegations of facts not appearing of record are relied upon in support of a motion, all affidavits and other pertinent documents then available shall accompany the motion. All such documents not then available shall be filed before the hearing of the motion.

(e) BRIEF SUPPORTING MOTIONS. Motions shall be accompanied by a brief which shall contain a concise statement of reasons in the support of the motions, and citation of authorities upon which the movant relies.

(f) RESPONSE AND BRIEF. If the respondent opposes a motion, he shall file his response, including brief and such supporting documents as are then available, within five (5) days after service of the motion. Briefs shall contain a concise statement of reasons in opposition to the motion, and a citation of authorities upon which the respondent relies. For good cause appearing therefor, a respondent may be required to file his response and supporting documents, including brief, within such shorter period of time as the

court may specify, or may be given additional time upon request made to the court.

(g) Service of Motion and Response. The movant and respondent shall serve copies of their respective papers upon opposing counsel before they are filed with the clerk, and such papers must indicate the time and method of service.

(h) Request for Oral Argument. Oral argument may be had on written notice therefor, or the court may, in its discretion, order oral arguments on any motion. A request for oral argument shall be separately stated by the movant or respondent at the conclusion of the motion or response.

(i) Failure To File and Serve Motion Papers. Upon failure of movant to file a brief in support of the motion, the court may automatically deny the motion for failure to conform to subsection (e). Upon failure of respondent to file a response and brief in opposition to the motion, the court may treat the motion as conceded and render whatever relief is asked for in the motion.

(j) Hearings on Motion. No motion shall be set for hearing until and unless the motion, objections to the motion and all supporting briefs and documents have been filed with the court. Motions filed which are not in conformity with this rule shall not be entertained by the court.

(k) Any Local Rule inconsistent with this Rule is hereby repealed.—Added Sept. 24, 1964.

[redacted]

[redacted]

[redacted]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1296

BERTY JEAN TYSON, *Petitioner*

v.

VIRGIN ISLANDS NATIONAL BANK, *Respondent*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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[redacted]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1236

BETTY JEAN TYSON, *Petitioner*

v.

VIRGIN ISLANDS NATIONAL BANK, *Respondent*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

The Virgin Islands National Bank, the Respondent herein, prays that the Petition for Writ of Certiorari be denied.

JURISDICTION

Petitioner's statement as to this Court's jurisdiction to hear the Petition is accepted. It is Respondent's contention, however, that the case does not fall within the guidelines set forth in Rule 19, Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

Petitioner's statement of questions presented are not acceptable in the form in which set forth; they are argumentative and set forth conclusions not supported by the facts. We would restate each one as follows:

1. Did the District Court abuse its discretion in confirming a judicial sale without a hearing where the judgment debtor failed to file objections to the sale as required by local statute?

2. Was there denial of due process by reason of the foregoing proceedings?

3. Was there an abuse of discretion by the District Court or the Court of Appeals in denying relief under Rule 60(b) Federal Rules of Civil Procedure?

STATEMENT

The first portion of the opinion of the Court of Appeals fairly states the basic facts of this case, and it appears unnecessary to burden the Court with a further Statement, except for one salient addition: the Motion to Confirm Sale was served not only on Petitioner but also upon her then attorney of record; no response or opposition to the Motion was filed by Petitioner or her counsel.

ARGUMENT

I. Respondent respectfully suggests that the Petitioner has not presented to this Court a substantial Federal question.

The orders of the District Court of the Virgin Islands, as affirmed by the Court of Appeals, do not present (a) a matter of conflict of decisions between Circuits, (b) a significant constitutional question, nor (c)

a matter of substantial public interest. The District Court of the Virgin Islands, after hearing testimony from both sides on March 4, 1974, found that Petitioner's Motion to set aside the sale should be denied. The Court of Appeals, after reviewing the record and the transcript of March 4, 1974 hearing, found no abuse of discretion and additionally, although raised for the first time in the Court of Appeals, that no relief should be granted Petitioner under Rule 60(b), Federal Rules of Civil Procedure. The case is of great concern to the parties only and involves no broad issues of law, public policy or public interest.

II. Since Petitioner has raised the question of her lack of opportunity to be heard, several matters should be pointed out which are implicit whether one reads Petitioner's Statement of the case or the facts as set forth in the Court of Appeals opinion:

1. Petitioner's first attempt to question the judgment of the District Court came on January 8, 1974, about one and one-half (1½) years after the judgment was entered.

2. Petitioner did not make objection to the judicial sale as required by 5 VIC 489(1). Petitioner's Brief characterizes this statutory requirement as setting "too high a standard for an unrepresented litigant". In this connection, it should be stated that Petitioner did not even attend the judicial sale although she had both actual and constructive knowledge of such.

3. Although Petitioner admits being served with the Motion to Confirm Sale on July 10, 1973, neither the Petitioner nor her then counsel of record, who was also served, made any response or filed any opposition to the Motion. Neither party to this action was aware

of the prior signing of the Order until July 16, 1973 when such was announced by the District Judge in open court. Had there been objections to the sale, as required by statute, it must be assumed that the Court would not have signed the Order. Had there been response or opposition to the Motion to Confirm Sale, the Court would unquestionably have set aside the Order and proceeded to hearing. This is simply one further instance of Petitioner's insistence upon her rights and, at the same time, ignoring her obligations. Since foreclosure is an equitable proceeding, we are persuaded to comment that Petitioner, as well as Respondent, is subject to the "clean hands doctrine".

4. Assuming, *arguendo,* that 5 VIC 489(1) is hard on an "unrepresented litigant", it should be noted that Petitioner did not move to vacate the Order Confirming Sale; nor did she, within the thirty (30) days allowed, appeal to the Court of Appeals.

5. Although Petitioner's Motion to Reopen Case and Amended Judgment was denied on February 12, 1974, she failed to appeal from that Order but filed another Motion. In both instances she was represented by counsel.

6. The foregoing points were basis for a Motion to Dismiss the appeal to the Court of Appeals; decision on that Motion was held in abeyance until "submission of the case to the panel". The Court of Appeals heard Petitioner on the merits.

III. Although we regard it as quite peripheral, the Petitioner's claims of being an "unrepresented litigant" must be answered. Petitioner has been represented by two different attorneys in the District Court and by her present counsel on an appeal to the Court

of Appeals and the Petition before this Court. If at any time she was unrepresented, it was of her own volition. In any event, the statutes and rules must apply to all.

IV. Also peripheral is Petitioner's claim that both the District Court and the Court of Appeals ignored the judicial precedent of *Lucerne Investment Company* v. *Estate Belvedere, Inc.*, 7 V.I. 275 (Dist. Ct. of V.I., 1969) The Courts could not do otherwise; on March 6, 1974 the District Court, in *Mt. Washington Estates* v. *Brumick Corporation* (D.C.V.I., Civil No. 484/1973) stated as follows in commenting on Lucerne:

> "I should note, however, that this is the exception, and not the rule. The special circumstances present in this case will seldom recur. Moreover, the relaxation of the five day rule suggested by *Lucerne* is not to be relied upon generally. The objections in that case, although not within the five-day period, did precede the petition for confirmation and this consideration seems critical in arriving at the conclusion that 'interests of justice' demand consideration of the objection."

V. We respectfully suggest that there was no abuse of discretion by the Court of Appeals in denying relief under Rule 60(b), Federal Rules of Civil Procedure. *Klapprott* v. *United States,* 335 U.S. 601 would not appear to provide Petitioner with an argument for relief; the case was ultimately remanded and Klapprott was denied relief. However, in *Ackerman* v. *United States,* 340 U.S. 193, the Supreme Court indicated that Ackerman was not entitled to relief under Rule 60(b) although he was without funds and in detention at a time when he should have appealed; the Court said the case did not present the "extraordinary circum-

stances" required for relief. The following comment from Wright and Miller, *Federal Practice and Procedure,* Vol. 11, Section 2864, would appear to be relevant to this Petition:

> "The broad power granted by Clause (6) is not for the purpose of relieving a party from free calculated and deliberate choices he has made. A party remains under a duty to take legal steps to protect his own interests. In particular, it is not permissible to use this motion to remedy a failure to take an appeal."

Petitioner could have appealed the Judgment, objected to the judicial sale, moved to vacate the Order Confirming Sale, or appealed from the Order Confirming Sale. Petitioner did none of these things. Petitioner's claims of lack of notice and opportunity to be heard are quite groundless, and the case does not present the extraordinary circumstances required to invoke Rule 60(b).

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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